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# THE ALIENABILITY OF CHOSES IN ACTION

THE complete history of the law relating to the assignment of *choses* in action remains to be written. The late James Barr Ames gave us a portion of it in his essay upon "The Inalienability of Choses in Action." [1] In that essay he traced for us the development of the law relating to the subject in the common law courts of England, but not to any considerable extent its development in the English court of equity or in American courts of law and equity. In his essay the learned author also reached certain conclusions concerning the present state of the law relating to the alienability, or inalienability, of *choses* in action, these conclusions being based in part upon his historical survey and in part upon an analysis of the fundamental nature of *choses* in action. It is the purpose of the present paper to follow the development of this branch of our law from its earliest beginnings in English equity, so far as they can be ascertained, down to the present day. An attempt will also be made to present what is believed to be a more accurate analysis of the nature of ownership of a *chose* in action. It is believed that a wider historical survey and a more careful and thoroughgoing analysis will throw much additional light upon the matter and aid us in reaching a clearer understanding of the actual law now in force in our own country.

We start, of course, with the proposition that according to the original common law rule, which had a few exceptions enumerated by Mr. Ames, a *chose* in action was not assignable. At the outset let us first of all ask ourselves just what it is that the common law refuses to recognize as assignable. Perhaps we cannot do better than to take as the starting point of our discussion passages from the essay already referred to. The learned writer says:

"The rule (that a *chose* in action is not assignable) is . . . believed to be a principle of universal law. A right of action in one person implies a corresponding duty in another to perform an agreement or to make

[1] 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, p. 580; reprinted in LECTURES ON LEGAL HISTORY, p. 210.

reparation for a tort. That is to say, a *chose* in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated, cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferor and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*. But where one has a mere right against another, there is nothing that is capable of transfer. The duty of B. to A., whether arising *ex contractu* or *ex delicto*, may of course be extinguished and replaced by a new and coextensive duty of B. to C. But this substitution of duties can be accomplished only in two ways: either by the consent of B., or without his consent, by an act of sovereignty. The exceptions already mentioned of assignments by or to the king, and conveyances of remainders and reversions in the King's Court, are illustrations of the exercise of sovereign power. Further illustrations are found in the bankruptcy laws which enable the assignee to realize the bankrupt's *choses* in action, and in the Statute 4 and 5 Anne, c. 16, which abolished the necessity of attornment."

To the mind of the present writer, the analysis of the nature of a *chose* in action here presented by the learned author is inadequate and possibly even misleading. To begin with, the word "transfer" is used in two senses in the passage quoted. When the transfer of the physical thing is spoken of, what is meant is merely the physical delivery of custody; when the transfer of legal rights is referred to, what is meant is of course something quite different. Upon analysis, as the learned author himself states, it seems very clear that no rights are, strictly speaking, transferable. What happens, for example, upon a so-called transfer of title to real property from A. to B. is, that the rights and other jural relations of A. in relation to his fellowmen with respect to the object transferred are extinguished or divested and that B. becomes invested with similar though not necessarily identical rights and other jural relations. Whether in a given case A. and B., either singly or acting in cooperation, can do acts to which the law attaches such legal consequences seems to be purely a question of positive law. In this respect it does not seem possible to recognize that the transfer or assignment of a *chose* in action involves anything fundamentally different from what is involved in a transfer of a *chose* in possession. A. has a certain *chose* in action, say a claim for $100, based upon a

common law debt, against X. Can A. and B., without X.'s consent, do acts to which the law will attach the legal consequences that A.'s claim against X. will be divested and B. be invested with a similar claim against X.? It seems clear that to this question no answer based upon *a priori* reasoning can be given; it also is purely a question of positive law.

Just what the learned author from whom we have quoted meant by the statement that the rule that a *chose* in action is not assignable "is a principle of universal law" the present writer has never been able to decide. If all that is meant is that it seems to be the original view of both the Roman law and the common law, it is true; but if it means that the rule is a necessary one, one that must exist in all systems of law, it seems to be erroneous except in the sense that all legal rights are from their nature not, in the strictest sense, transferable. Thus interpreted, however, the statement, while true, is of little value, for we can say with equal truth that it is a principle of universal law that property rights of all kinds are not transferable. It has seemed worth while to discuss this passage in the essay referred to for the reason that some at least of Dean Ames's students seem to have assumed that he meant by it the erroneous proposition that there is some universally necessary and absolute principle of universal law — one that from the nature of things must exist in all systems of law — which renders the transfer of a *chose* in action impossible but does not prevent the transfer of other legal rights. For example, one of them says:

"Dean Ames has shown, that while the title to a corporeal thing is transferable, the title to a *chose* in action, which is an incorporeal thing, is incapable of transfer. Consequently, the purchaser of a corporeal trust *res* — a legal or equitable *chose* in action — whatever else he acquires, acquires no title." [2]

[2] Thaddeus D. Kenneson, 23 YALE L. J. 194. Mr. Kenneson uses the supposed principle that a *chose* in action is "incapable of transfer," by which he seems to mean incapable because of its nature, as a premise to a series of arguments which seek to demonstrate the incorrectness of Mr. Ames's conclusions as to the law relating to *bonâ fide* purchasers for value. By assuming the further premises that equitable interests are *choses* in action (in which he seems to follow Mr. Ames), he apparently reaches the conclusion that they are not transferable. As the contrary has been the law for a long time, it is obvious that there is a flaw somewhere, and clearly it is found in the premises, both of which seem to the present writer erroneous. Whether the conclusions in regard to the doctrine of *bonâ fide* purchaser for value as applied to the transfer of equitable interests which the learned writer draws from his argument are sound or not is another question and one which cannot be discussed here.

Let us return to our question, What is this *chose* that at common law cannot be assigned? What is it that one who "owns" or "has title to" a *chose* in action really has that he cannot transfer or assign? Upon analysis it turns out to be a much more complex thing than seems to have been supposed. Let us begin with a concrete example of a *chose* in action of some kind — say the common law debt for $100 previously referred to, A. being the creditor and X. the debtor. What jural relations go to make up that complex of jural relations — the debt? In the first place — and this is about the only thing that usually is thought of — A. is said to have a right *in personam* against X.; X. is said to be under a duty to A. to pay him the $100 when it is due. Another way of stating this is, that if X. does not pay the money when due, A. will acquire a cause of action of a certain kind — debt or *indebitatus assumpsit* in the case supposed — and can, by taking the appropriate proceedings, obtain a judgment against X. and enforce it by the usual means. A little reflection, however, shows us that this by no means constitutes the whole of "ownership" of or "title" to the debt. One who owns such a *chose* has also what some of us, especially those who are engaged in the teaching of law, are coming to call "legal powers." The owner of the debt can, for example, do acts which will bring about the extinguishment of the debt. One way is by executing and delivering a release under seal; another is by accepting payment, or something other than money by way of accord and satisfaction. By suing on the debt and reducing it to judgment, the creditor can bring it about that the original debt is extinguished and its place taken by a new obligation, a debt of record. The legal ability to accomplish any one of these or similar results is aptly called a legal "power." [3] Let us note in passing that the rule of the old common law that we are discussing denies to the owner of a *chose* in action a legal power which owners of other kinds of property usually have, *viz.*, to do acts which will both divest the creditor's right *in personam* against the debtor and invest an assignee with a similar right.

[3] See the valuable article by Professor Wesley N. Hohfeld of Yale University on "Some Fundamental Legal Conceptions" in 23 YALE L. J. 16. The fundamental concepts used in this article are the ones there set forth, and the learned reader is referred to Mr. Hohfeld's discussion for their further elucidation. And see Dean Roscoe Pound's article on "Legal Rights," in 26 INT. JOURN. OF ETHICS, 92. Compare also TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, §§ 113–29; also the present writer's discussion in 15 COL. L. REV. 40–44.

Continuing our analysis of the concept of ownership of a *chose* in action, we find farther that if one is completely the owner of a *chose* in action he may, without committing any legal wrong against anyone, exercise these various powers, *i.e.*, he is under no duty to others to refrain from exercising them, or, as we say, other people have no right that he shall not exercise them. This absence of duty to refrain from doing certain things some of us are getting into the habit of calling a legal "privilege," borrowing the term from the law of evidence, where we speak of the "privilege" of a witness not to testify, meaning thereby that he is under no duty to testify. Applying this to the ownership of a *chose* in action, we may say that in addition to the rights and powers described, the owner of the *chose* in action has certain legal privileges — to release the *chose*, accept payment, or enter in agreements of accord and satisfaction, etc.

A thoroughgoing analysis of the concept of ownership of a *chose* in action requires us to add one more element to those already mentioned. Complete ownership of any *chose*, whether in action or in possession, includes also the absence of legal powers on the part of other persons to do many of the things which the owner of the *chose* has the legal power to do. This we may express by saying that the owner of a *chose* in action possesses certain legal "immunities" from the power of other persons to do acts which will, for example, release or otherwise extinguish the rights above described. To sum up: We may say that the complete ownership of a *chose* in action is an aggregate of legal rights, privileges, powers and immunities of the kinds described.[4] Our real problem, therefore, is this: Can the owner of a *chose* in action, either singly or in coöperation with a third person, the assignee, but without the consent of the one against whom the *chose* in action exists, do acts to which the law will attach the consequences that this aggregate of rights and other jural relations will be divested and the assignee become invested with a similar aggregate? In other words, does ownership of a *chose* in action include a *legal power* as well as a *legal privilege* to bring about such a result? As already stated, originally at common law it certainly did not. It is, however, the contention of the present writer

[4] The analysis in the text does not include the jural relations growing out of the *chose* in action which exists between the owner of the *chose* and persons other than the one immediately bound. Lumley *v.* Gye, 2 E. & B. 216 (1853), and similar cases show that such jural relations exist.

that a careful survey of the historical development of the law, especially in this country, will show that the common law, by a gradual process of judicial legislation, stimulated no doubt by developments which went on in equity, and aided in some jurisdictions by statutes, reached the final result of making *choses* in action really alienable; and that statutes permitting the assignee to sue in his own name merely change the label of the action and not the substantive law. The contention, in other words, is, that the assignor really ceased to be regarded in any way as the owner of the *chose* in action, except for the purpose of lending his name to the title of the suit.

With the foregoing analysis as our guide, let us test this theory by examining the historical development of the law upon the subject. As might be supposed, we must begin with equity. Since Dean Ames wrote his essay, we have learned much concerning what went on in chancery during the early days. For this we are, with reference to our topic, especially indebted to the investigations of the chancery petitions during the fifteenth century, recently made by Mr. W. T. Barbour. With reference to the assignment of debts, Mr. Barbour says that "among the earliest petitions (in chancery) preserved we find assignees seeking to recover in their own names debts which had been assigned to them." [5] It is not possible to say certainly whether at this time any consideration was required, though apparently it was not; but that assignments were enforced in equity seems clear. In any event, we know from later cases that it became the settled doctrine that the assignee, at least where there was a consideration, and perhaps where there was none, could recover from the debtor by bill in equity brought in the name of the assignee.[6] It is important to notice that the chancellor regarded the debtor after notice of the assignment as owing

[5] "The History of Contract in Early English Equity," by W. T. Barbour, in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, edited by Paul Vinogradoff, p. 108.

[6] Some of the early cases in equity are: Perryer *v.* Hallifax, Rep. *temp.* Finch, 299 (1677); Fashion *v.* Atwood, 2 Ch. Cas. 36 (1680); Peters *v.* Soame, 2 Vern. 428 (1701); Anonymous, 2 Freem. Ch. 144 (1675); Atkins *v.* Dawbury, Gilb. Eq. Rep. 88 (1714); Lord Carteret *v.* Paschal, 3 P. W. 199 (1733); Row *v.* Dawson, 1 Ves. 331 (1749). There is confusion in the cases as to the necessity for consideration. It seems probable that originally it was not necessary, but that ideas as to maintenance, etc., led to a change of view. The resulting confusion in the authorities has left its traces in modern law. The subject is discussed by Mr. Edward Jenks, Sir W. R. Anson, and Professor George P. Costigan, Jr., in the LAW QUART. REV., vol. 16, p. 241; vol. 17, p. 90; and vol. 27, p. 326.

the debt directly to the assignee. The common law, however, continued for a considerable period to deny any validity whatever to an attempted assignment, having by this time developed the idea that the power of attorney, by which it was sought to evade the common law prohibition against assignment, unduly stimulated litigation and so was prohibited by the statutes against maintenance.[7] It thus appears that there was a period in the history of English law during which the assignee acquired by the assignment no legal rights of any kind, but did acquire equitable rights against the one liable on the *chose* in action. The aggregate of common law rights and other jural relations composing ownership of the *chose* in action remained vested completely in the assignor, just as they do in the case of a typical trust; but the chancellor gave to the assignment the effect of creating in equity a new aggregate of rights and other jural relations. This aggregate of equitable jural relations included, in addition to the rights against the debtor, also a right that the assignor should refrain from exercising the privileges and powers which the common law still ascribed to him. A complete analysis would of course show that the assignee also possessed certain equitable privileges, powers, and immunities. This state of the law explains the origin of the familiar statement, true at the period of which we speak, but long since outgrown, that "a *chose* in action is assignable in equity but not at law."

The common law lawyers and judges, no doubt stimulated by this development in chancery, began to try to find some method of evading their rule against assignability. Down to a certain point, Mr. Ames has accurately described what happened on the common law side. By gradually changing their views concerning the illegality of assignments because of maintenance, the common law lawyers were able, through the device of the "power of attorney" already referred to, to enable the assignee to obtain relief in common law proceedings by suing in the name of the assignor. At first an express power of attorney was required, but later one was implied.[8]

[7] AMES, LECTURES ON LEGAL HISTORY, p. 213.

[8] AMES, *loc. cit.*, p. 214, note 1. Apparently Dean Ames thought of the power of attorney as "implied in fact," for he speaks of it as "implied from circumstantial evidence." But was any evidence beyond the "assignment" itself necessary in the fully developed doctrine? It would seem that the "power of attorney" was "implied in law," *i. e.*, was attached by the law to each assignment as a legal consequence of the same, irrespective of any implied intention in fact.

Originally, of course, the theory was that the assignee sued as the agent or attorney of the assignor, although entitled to appropriate the proceeds to his own use; and it seems to be the contention of Mr. Ames, or at least of some who follow his theory, that this has ever since remained the law.[9] As has already been indicated, it is the belief of the present writer that a consideration of the cases, especially those in this country, will show that any such view is not warranted by the cases.

Perhaps before going farther it may be well to note what is really involved in the theory that the assignee is really in some sense the agent or attorney of the assignor in collecting the *chose* or in suing upon it. If the assignee is an agent and the assignor is still the owner of the *chose*, it would seem to follow that the assignor must retain the common law powers mentioned above. He must have, for example, the power to give a valid release, accept payment or accord and satisfaction, control the suit if brought in the common law court in his name, enter satisfaction of the judgment, control the issue of execution on it, etc., etc. Doubtless, as soon as the legality of the "power of attorney" is recognized, he is under a duty not to do these things, *i.e.*, he has lost some of his common law "privileges," so that he will incur a legal liability in damages for breaking his duty to the assignee not to do these acts except for the benefit of the assignee.[10] Absence of privilege, however, does

[9] AMES, *op. cit.*, p. 214, note 3; Kenneson, *loc. cit.* In the note referred to, Dean Ames contends that the bailor's interest in the chattel bailed is a *chose* in action and "upon principle and by the old precedents no more transferable than that of a creditor." He admits that the old precedents are no longer the law, so far as the decisions of the cases go, and it is difficult to see what the "principle" which forbids the transfer is, except the supposed "principle of universal law" previously referred to. It seems also that even if we admit the validity of such a principle, the assertion as to the bailor's interest is incorrect. The bailor has a true right *in rem* against "all the world" that they shall refrain from dealing with the chattel without authority, and may sue third persons unlawfully dealing with the chattel while in the bailee's possession, bringing trover or case, according to the circumstances. *Cf.* my discussion of similar questions in 15 COL. L. REV. 46; also the recent articles in the HARV. L. REV. for February and March, 1916, by Professor Percy Bordwell of Iowa.

The present writer is convinced that some of Dean Ames's students misinterpret Mr. Ames's real meaning when he says that the assignee held only a "power of attorney." He says (1 CASES ON TRUSTS, 2 ed., p. 61) that it was a power "for the attorney's own benefit," which, of course, is inconsistent with its being merely an agency, as, for example, Mr. Kenneson seems to assume.

[10] It should be emphasized that the assignor is no longer complete owner of the *chose* in action if he has ceased to have all the privileges of an owner, *i. e.*, if, not as a

not mean absence of legal power, and so long as the theory of agency is followed, the extent of the assignee's rights in a court of law would be measured by an action for damages, and he would be powerless to prevent the breach of duty on the part of the assignor. If he wished preventive relief, it would be necessary for him to resort to equity, with its power to issue injunctions and its theory that the assignee ought to be regarded as the owner and protected accordingly.

For a time after the legality of the "power of attorney" came to be recognized it is undoubtedly true that the assignee had no greater rights in a court of law than have just been described; but the common law could not and did not remain in this condition. Traces of a farther evolution begin to appear at a relatively early date. In a case in the King's Bench in 1676 (*Carrington* v. *Harway*, 1 Keble 803), it appeared that the plaintiff, who was resident in Spain, had executed a letter of attorney to acknowledge satisfaction of a judgment which he held against the defendant. Counsel prayed that satisfaction might be acknowledged by the attorney's name in the letter, but the court refused, the plaintiff "having before assigned it [the judgment] over to one Cocke, which, being in satisfaction of just debt, is not revocable." The effect of a decision of this kind, of course, is to deprive the assignor of one of his common law powers, for clearly the real owner of a judgment could do what the plaintiff had attempted. Again in Lilly's Practical Register[11] we find the statement that the death of the assignor does not revoke the so-called power of attorney, but that the assignee may sue in the name of the assignor's administrator even without the latter's consent. Clearly the old theory is giving way, so far as results are concerned, although the courts still say that the assignment "does not vest an interest" in the assignee. In 1799, in the case of *Legh* v. *Legh*,[12] the Court of Common Pleas was confronted with this situation: the assignor of a bond, after the assignee had begun suit in the name of the assignor, accepted payment from the debtor who had notice of the assignment, and also executed a release, which release was

mere matter of contract, but because of an interest in the *chose* which is beginning to be ascribed to the assignee, he is regarded as under a duty to the assignee to refrain from exercising his common law powers. He no more has complete ownership than has the owner of the servient tenement in the case of an easement.

[11] LILLY'S PRACTICAL REGISTER, 2 ed. (1735), p. 124.

[12] 1 Bos. & Pul. 447.

pleaded as a defense by the debtor when sued by the assignee in the name of the assignor. On the theory that the assignor at law still owned the bond, this plea stated a complete defense to the action and the assignee's only remedy would be an action for damages against the assignor or by bill in equity for cancellation of the release. However, the counsel for the real plaintiff, the assignee, obtained a rule *nisi* for setting aside the plea and ordering the release to be canceled. The following extracts from the original report are worthy of quotation:

"Eyre, Ch. J. The conduct of this Defendant has been against good faith, and the only question is, whether the Plaintiff must not seek relief in a Court of Equity? The Defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the Defendant to avail himself of this plea, since a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the costs of the application."

"Buller, J. There are many cases in which the Court has set aside a release given to prejudice the real Plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

"*The Court* recommended the parties to go before the prothonotary, in order to ascertain what sum was really due to the Plaintiff on the bond.

"*Shepherd* on this day stated that the Defendant objected to going before the prothonotary, upon which the *Court* said, that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the statute to plead several pleas, the Court had no discretion.

"Eyre, Ch. J. The Court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be against good faith. Thus we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the *real Plaintiff*, this Defendant has colluded with the *nominal Plaintiff* to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the Court (*Vide Donnolly* v. *Dunn*, 2 B. & P. 45). And if so, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

"Buller, J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment against the nominal obligee.

"Upon this the Defendant consented to go before the prothonotary." [13]

We have now reached the time when America separated from the mother country and we must therefore transfer our attention from English to American cases, for in this, as in so many other branches of our law, the so-called "common law" is received not as a completed system but as a growing organism whose further development under new and different surroundings is not necessarily the same as in the old home. The earliest American case worthy of notice which the present writer has found is one decided in 1772.[14] In that case (*Bildad Fowler* v. *John Harmon*, reported in the opinion in another case) the Superior Court of New Haven County, Connecticut, had the issue placed squarely before it. The plaintiff, who had brought an action of trover, proved that he was assignee of a note payable in grain, the place of payment being the house of the promisor; that the promisor tendered the grain there; that it remained there for some time, as no one was there to receive it when tendered; that the defendant, a constable, under a judgment and execution against the assignor, attached the grain as the property of the assignor and took it away. Verdict and judgment were for the plaintiff, "for by the assignment of the note, the property of the grain upon the tender, vested in the assignee." Clearly here is no theory of agency, for, be it noted, the assignee had never dealt with the grain in any way. On the theory pursued by the writer in the Yale Law Journal previously quoted, the grain when tendered first becomes the property of the assignor, and passes to the assignee only when he appropriates it under an authority given him by the assignor to do so. On the agency theory the title to the grain vested in the assignor, and as the assignee never appropriated the grain or had anything to do with it, the plaintiff's trover action would fail. As we have seen, the court held just the contrary, *viz.*, that the property vested directly in the assignee.

In the same state, in a case in 1794, where the debtor had taken a release after notice of the assignment, we find the Supreme Court

[13] *Cf.* similar action *in personam* by law courts in Payne *v.* Rogers, 1 Doug. 407 (1780); *Doe dem.* Lock *v.* Franklin, 7 Taunt. 9 (1816); Hickey *v.* Burt, 7 Taunt. 48 (1816); Mountstephen *v.* Brooke, 1 Chitty 390 (1819).

[14] The case is reported in the case of Redfield *v.* Hillhouse, 1 Root (Conn.) 63 (1774).

saying to an assignee who had sued the promisor in equity, that probably now the assignee could get adequate relief at law without coming to equity, but that this time they will allow equitable relief as they have done in the past.[15] Three years later, on similar facts a court of the same state denied equitable relief on the sole ground that the assignee had a complete and adequate remedy at law.[16] This remedy at law seems in Connecticut to have been by tort action against the original debtor or against the assignor. Apparently the Connecticut court at this time had not reached the conception of *Legh* v. *Legh*, that the release could be treated as a nullity by a common law court, and of course the English case was not decided until 1799. In another early case, this time in Pennsylvania, a common law court in 1785 refused to recognize a power of attorney given by the nominal plaintiff authorizing a dismissal of the suit, where it appeared that there had been an assignment for a valuable consideration.[17] This of course is in principle the same as the English case of *Carrington* v. *Harway* previously referred to.

In several of the states the development begun by the English cases was pushed to its logical conclusion. In New York especially, under the leadership of Chief Justice Kent, the development was very rapid. In 1800 the New York Supreme Court decided the case of *Andrews* v. *Beecker*.[18] That was an action of debt on a bond. To a plea of release the plaintiff replied that prior to the release he assigned the bond to a third person, of which the defendant had notice. On demurrer the replication was held good, the court saying, "A release after the assignment of the bond and notice to the defendant, is a nullity and ought not to be regarded." The logical inconsistency of such a replication does not seem to trouble the court, but it is certainly perplexing to be told that the nominal plaintiff owns the *chose*, and the assignee does not; but that a release by the alleged owner, theoretically the plaintiff, is a legal nullity. Following our analysis, we recognize that, to use a some-

[15] Russel *v.* Cornwell, 2 Root (Conn.) 122 (1794).

[16] Booth *v.* Warner (1797), reported in Coleman *v.* Wolcott, 4 Day (Conn.) 6, 18 (1809).

[17] M'Cullum *v.* Coxe, 1 Dall. 139 (1785). The Chief Justice suggested that the assignee's name and the fact that the suit is for his benefit should be put on the margin of the record, so as to give notice of the real situation, stating that this was the practice when he was at the bar.

[18] 1 Johns. Cas. (N. Y.) 411.

what homely figure of speech, one of the sticks in the bundle of jural relations which go to make up ownership in the assignor is now actually missing, *viz.*, the common law power to extinguish the *chose* by a release under seal. Not only is it a legal wrong for the assignor to do this — he no longer has the legal power to do it.

In the following year (1801) the same court decided another case in which they took a similar step. The assignor of a judgment had wrongfully entered satisfaction. This was on motion ordered vacated, the court saying:

"The assignee of the judgment is to be recognized by this court, as the owner, and all acts of the plaintiff (assignor) subsequent to the assignment, and affecting the validity of the judgment were fraudulent. He has no more power over the judgment than a stranger." [19]

In the case of *Littlefield* v. *Storey*, decided by the same court in 1808,[20] to a plea of payment the replication was, that prior to the payment the obligation had been assigned, that the defendant had notice of the assignment, and that the action was commenced for the sole use of the assignee. On demurrer, the replication was held good, and so another common law power of the assignor vanished. After notice of the assignment to the debtor the alleged owner of the *chose* in action no longer had the power to bring about its extinguishment by accepting payment.

The New York court seems to have carried to its logical conclusion its doctrine that after notice to the debtor the assignee in a court of law is to be treated as the owner for all purposes, with the one exception that in the title of the action the name of the assignor must be used. Perhaps the most extreme example, and one not followed by all courts, is found in the case of *Dawson* v. *Coles*, decided in 1819.[21] The court went so far in that case as to hold that a plea of previous recovery by the plaintiff was satisfactorily answered, by way of confession and avoidance, by a replication which set out the assignment, notice to the debtor, and that the previous suit and recovery were brought by the plaintiff-assignor, for his own use, of which the defendant had notice. This so clearly denies ownership to the assignor and ascribes it to the assignee that it seems hardly worth while to do more than make

[19] Wardell *v.* Eden, 2 Johns. Cas. 258 (1801).

[20] 3 Johns. (N. Y.) 425.

[21] 16 Johns. (N. Y.) 51.

that assertion. If the real owner of a *chose* in action sue upon it and recover judgment, the *chose* in action is gone, being merged in the judgment. A theory that the assignee was the agent of the assignor would require us to hold in the case just cited that the original claim was gone, but that the assignee had some kind of a claim to the resulting judgment. In fact, as suggested, the older theory of our law prevented all courts from following the view of the New York court.[22]

From this time on there is, however, little uncertainty in the vast majority of the cases, and the new doctrine is by most of the courts applied with reasonable consistency, if such a word can fairly be used in connection with a doctrine which begins by ascribing ownership to one man and ends by denying it to him and ascribing it to another. As has already been said, and as was to be expected with so complicated and anomalous a doctrine, there were at times in some states cases which did not go to the limit established by the New York decisions. We can of course in a survey of the kind we are making deal only with the generally prevailing views and not with all local variations in matters of detail. The following extracts are, it is believed, typical, in spite of occasionally dissenting voices:

"Although, as a general principle, a *chose in action* or a right in one to sue another to recover money or property in a court of law is not assignable, so as to enable the assignee to sue in his own name, yet it has long been settled by repeated decisions, not now to be doubted, that the law will protect the equitable interest of an assignee for a valuable consideration, and that the promisor shall not be permitted to avail himself of any payments made to the promisee subsequent to his having notice of the assignment, and that any release made to him by the promisee, after such notice, would be a fraud upon the assignee, and would not defeat an action brought for his benefit in the name of the assignor. . . . The assignee is to be recognized as the owner, and all acts of the assignor subsequent to the assignment, and affecting the validity of the contract, are fraudulent. *He has no more power over it, than a stranger;* but until the promisor has notice of the assignment all payments made by him, and all acts of the promisee in respect to him, are good." [23]

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[22] See note 32, *infra*.

[23] Parris, J., in Hackett *v.* Martin, 8 Greenl. (Me.) 77, 78 (1831). The italics are the present writer's.

"I speak not of *chancery*, merely; it is the same at law. There is no hostility between the different jurisdictions on this subject. It is a *well settled principle of common law in Connecticut, that the property in a chose in action, may be assigned; and the courts of law have long since recognized the property in the assignee as fully as courts of chancery.* The last feature, which remained for some time, to distinguish the two jurisdictions, was that of resorting to a court of chancery for redress against an obligor, who had received a discharge from a bankrupt obligee, knowing the debt to be assigned. But this distinguishing feature is now removed; and the course is so well settled to bring suits at law, that I feel no hesitation in saying, that a court of chancery would not sustain a bill of the kind. *The old form of bringing the suit on the note, in the name of the obligee, is, indeed, continued; but it is now mere form.*" [24]

Without attempting to state and discuss in detail individual cases, let us run briefly over some of the main results of the new doctrine. In each case it will be assumed, unless the contrary is stated, that notice of the assignment has been given to the debtor.

1. Payment to the assignor or a release by him does not discharge the obligation.[25]

2. An accord and satisfaction entered into and carried out between the assignor and a debtor who has notice is invalid.[26] In the case of the assignment of a contract right before breach, instead of a debt or cause of action, any conditions precedent may be

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[24] Smith, J., in Colbourn *v.* Rossiter, 2 Conn. 503, 508 (1818). The italics are the present writer's.

[25] Payment no defense at law. Jones *v.* Witter, 13 Mass. 304 (1816); Anderson *v.* Miller, 7 Sm. & M. (Miss.) 586 (1846); Clark *v.* Rogers, 2 Greenl. (Me.) 143 (1822); Hackett *v.* Martin, 8 Greenl. (Me.) 77 (1831); Littlefield *v.* Storey, 3 Johns. (N. Y.) 425 (1888).

Release no defense at law. Legh *v.* Legh, 1 Bos. & Pul. 447 (1779); Dunn *v.* Snell, 15 Mass. 481 (1819); Duncklee *v.* Greenfied Steam Mill Co., 23 N. H. 245 (1851); Andrews *v.* Beecker, 1 Johns. Cas. (N. Y.) 411 (1800); Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 121 (1801); Martin *v.* Hawks, 15 Johns. (N. Y.) 405 (1818); Briggs *v.* Dorr, 19 Johns. (N. Y.) 95 (1821); Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34 (1828); Hackett *v.* Martin, *supra*. Attention is called to the fact that no attempt at exhaustive citation has been made in any of the notes to the present paper. It is believed that the cases cited are typical and represent the general trend of the authorities. The earlier cases which settled the law have so far as possible been selected for citation. If there are dissenting voices upon any points, the attempt is made to call attention to the fact by citation of typical cases.

[26] Jenkins *v.* Brewster, 14 Mass. 291 (1817); Eels *v.* Finch, 5 Johns. (N. Y.) 193 (1809).

performed by the assignee; and conversely, tender should be made to the assignee.[27]

3. Within the meaning of statutes relating to execution, the assignee is the execution creditor, in spite of the fact that the judgment nominally stands in the name of the assignor.[28] So also the assignee is the creditor within the meaning of an insolvency act requiring notice to creditors.[29]

4. If after the assignment the assignor becomes insolvent and bankruptcy proceedings are had, the assignee may still use the assignor's name in suing the debtor and the bankruptcy of the assignor is no defense to the action as it would be if the assignor still owned the claim. The same principle is applied in similar cases of disability of the assignor to sue for his own benefit.[30]

5. On the theory of ownership in the assignee, payments made to him or releases given by him should have the effect of extinguishing the claim, and it is so held.[31]

6. The judgment obtained nominally by the assignor but actually by the assignee, cannot be reached by the assignor's creditors. This is true apparently only where the attaching creditor has notice, either from some indication on the record or in some other way, a result, of course, which indicates the equitable origin of the assignee's common law rights.[32] This equitable origin must never be lost sight of if we are to understand the present state of our law. Of course the creditor has notice to-day, where by statute the action is brought in the assignee's name.

7. Former recovery, where the defendant knows that the suit is

[27] Van Vechten *v.* Graves, 4 Johns. (N. Y.) 403 (1809); Traders Insurance Co. *v.* Robert, 9 Wend. (N. Y.) 404 (1832); Allen *v.* Hudson River Mutual Ins. Co., 19 Barb. (N. Y.) 442 (1854); Hamilton *v.* Brown, 18 Pa. St. 87 (1851).

[28] Colbourn *v.* Rossiter, 2 Conn. 503 (1818).

[29] Lyford *v.* Dunn, 32 N. H. 81 (1856).

[30] Matherson *v.* Wilkinson, 79 Me. 159 (1887); Stone *v.* Hubbard, 7 Cush. (Mass.) 595 (1851); Parsons *v.* Woodward, 22 N. J. L. 196 (1849). Where the assignor had ceased to exist the assignee could not of course obtain relief in a law court. In such cases equity gave relief. Person and Marye *v.* Barlow, 35 Miss. 174 (1858).

[31] Cutts *v.* Perkins, 12 Mass. 206 (1815); other cases cited in 5 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW AND PRACTICE, 948, note 14. On all the points this article in 5 ENC. L. & P. contains many excellent citations.

[32] Willes *v.* Pitkin, 1 Root (Conn.) 47 (1764); Fobs *v.* Brewster, 1 Root (Conn.) 234 (1790); St. John *v.* Smith, 1 Root (Conn.) 156 (1790). If no notice, creditors of the assignor may of course attach. Woodbridge & Co. *v.* Perkins, 3 Day (Conn.) 364 (1809).

brought for the benefit of the assignor, is no defense to a suit in the assignor's name, brought for the benefit of the assignee. This view was apparently not accepted in all jurisdictions.[33]

8. The assignee is not bound by "trustee process" used against the assignor, unless made a party to the proceedings.[34]

9. An assignor who collects the debt is liable to the assignee in a common law action for money had and received.[35] This result, of course, does not, standing alone, prove much, as it is quite easy to permit a quasi-contractual action of this kind even if we consider the assignee's rights as primarily equitable and not legal.

10. The assignee is the only one who can control the court proceedings — dismiss the suit, etc.[36]

11. Admissions made by the assignor after the assignment are by most of the courts held inadmissible, though upon this point there is some dissent.[37]

12. Where the instrument is in the form of a common law specialty, the assignee can recover in trover against the assignor who has unlawfully detained the instrument, the measure of damages

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[33] Dawson *v.* Coles, 16 Johns. (N. Y.) 51 (1819). *Contra*, Armstrong *v.* Lancaster, 5 Watts (Pa.) 68 (1836), 30 Am. Dec. 293 (*semble*). The difficulty was to see how the assignee could defeat the suit by the assignor. Some cases held a plea stating the facts bad. Cage *v.* Foster, 5 Yerg. (Tenn.) 261 (1833), 26 Am. Dec. 265; Lynn *v.* Glidwell, 8 Yerg. (Tenn.) 1 (1835). These cases say that the assignee should state the facts in the affidavit (the assignment, and that the plaintiff is not suing for the use of the assignee), and obtain a rule to show cause why the suit should not be dismissed. Of course to-day when the assignee sues in his own name this difficulty does not arise.

[34] Page *v.* Thompson, 43 N. H. 373 (1861).

[35] Camp *v.* Tompkins, 9 Conn. 545 (1833); cases cited in 5 ENC. L. & P. 951.

[36] Southwick *v.* Hopkins, 47 Me. 362 (1860); Sloan *v.* Sommers, 14 N. J. L. 509 (1834); M'Cullum *v.* Coxe, 1 Dall. (Pa.) 150 (1785); cases cited in 5 ENC. L. & P. 975. Apparently Connecticut did not follow this rule, although on most points her law agreed with the other states. See remarks by Huntington, J., in Fitch *v.* Boardman, 12 Conn. 345 (1837).

[37] Prioleau *v.* South Western R. Bank, 16 Ga. 582 (1855); Hackett *v.* Martin, 8 Greenl. (Me.) 77 (1832); Frear *v.* Evertson, 20 Johns. (N. Y.) 142 (1822); Vrooman *v.* King, 36 N. Y. 477 (1867); Halloran *v.* Whitcomb, 43 Vt. 306 (1871). *Contra*, Bulkley *v.* Landon, 3 Conn. 76 (1819). Changed by Statute of 1822. See Scripture *v.* Newcomb, 16 Conn. 588 (1844).

The assignor could be a witness: Steele *v.* Phœnix Ins. Co., 3 Binn. (Pa.) 306 (1811); Browne *v.* Weir, 5 S. & R. (Pa.) 401 (1819); North *v.* Turner, 9 S. & R. (Pa.) 244 (1823). *Contra*, Hackett *v.* Martin, *supra;* Frear *v.* Evertsen, *supra*. Connecticut here followed the progressive view and permitted him to be a witness. Johnson *v.* Blackman, 11 Conn. 342 (1836).

being the value of what would have been recovered in the suit on the instrument.[38]

13. The right to control the issue and execution of process for the enforcement of the judgment is vested in the assignee. Here it is worth while to briefly examine at least one of the cases in detail.

In an action of debt on a judgment obtained by the assignee in the name of the assignor, the plea was that "the plaintiffs sued out their writ of execution and caused execution on said judgment to be done in full satisfaction thereof, and said execution to be returned fully satisfied." Issue was taken on the plea, and at the trial it appeared that the deputy sheriff had followed the instructions of the assignor, to proceed against the debtor's land, and had failed to proceed against the personal property of the debtor as the assignee had directed him to do. The Supreme Court of New Hampshire held that the sheriff should have done as directed by the "real owner" and that the common law court would protect the latter's rights.[39]

14. If the officer whose duty it is to carry out the execution process fails properly to discharge this duty, the result is to make him liable to the assignee in a tort action for damages for any resulting loss. This action is brought by the assignee directly in his own name, as the officer owes him the duty to execute the process for his benefit.[40]

15. Finally, one or two courts were bold enough to hold that the use of the assignor's name was a mere form; so that while the fact that suit was brought in the assignee's name could be objected to on demurrer, the objection could not be taken on motion after verdict. For example, in a New Jersey case the court said:

[38] Clowes *v.* Hawley, 12 Johns. (N. Y.) 484 (1815).

[39] Baker *v.* Davis, 2 Fost. (22 N. H.) 27 (1850).

[40] Colbourn *v.* Rossiter, 2 Conn. 503 (1818); Page *v.* Thompson, 43 N. H. 373 (1861); State *v.* Herod, 6 Blackford (Ind.) 444 (1843). Originally in such actions the assignee sued in the name of the assignor. Woodman *v.* Jones, 8 N. H. 344 (1836); Martin *v.* Hawks, 15 Johns. (N. Y.) 405 (1818). This produced a remarkable result in the case of Riley *v.* Taber, 9 Gray (Mass.) 373 (1857), where the assignee, suing in the name of the assignor, complained of the tort committed by the sheriff in paying the money realized from the execution over to the nominal plaintiff. Recovery was allowed for the benefit of the assignee, but in the name of the one who received the money.

The question of costs in the suit raised many difficulties. The whole tendency was to make the assignee liable and to exempt the assignor from liability. Canby *v.* Ridgway, 1 Binn. (Pa.) 496 (1808); Reigart *v.* Ellmaker, 6 S. & R. (Pa.) 44 (1820); *cf.* Mass. Statute as given in Coulter *v.* Haynes, 146 Mass. 458, 16 N. E. 19 (1888).

"The objection that the action cannot be maintained in the name of the present plaintiff, because the writing is a *chose* in action, and not assignable at law, so that the assignee may sue in his own name, is merely formal, and if valid, may be amended by inserting the name of Jennings [the assignor] as nominal plaintiff, upon proper terms. . . . The court may add formal parties . . . upon such terms as to the court may seem fit, for the purpose of determining in the suit the real question in controversy between the parties. *Washburn* v. *Burns*, 5 Vroom 18." [41]

In closing this part of the discussion, we cannot do better than to quote the words of Mr. Justice Collins in a recent New Jersey case:

"It is said that *choses* in action have always been held in this state to be "not assignable" at law, except by statute. . . . But all that is meant by such an expression as that quoted is that a *chose* in action was not assignable so as to permit the assignee to sue in his own name in a court of law. Subject to that restriction, even in England, from a very early day, *choses* in action have been assignable *in fact*, and no consideration of the prevention of maintenance has been allowed to prevail. . . . That there was no inherent non-assignability appears from the fact that the restriction was never imposed on an assignee of the crown." [42]

Nearly everywhere to-day the assignee is permitted to sue in his own name.[43] It seems clear that a statute of this kind merely does away with an empty formality which no longer serves any useful purpose. The old bottles are filled with entirely new wine and it is time to change the label.

A word must be said concerning the situation after assignment but before notice of it to the debtor. Clearly here the assignor retains some of the powers of an owner — he can extinguish the claim by release, accepting payment, etc. Such acts on his part, of course, are wrongs against the assignee and render him liable to actions for damages. Translating this into the terms of our analysis, we may say that the assignor retains some of his legal powers but has

[41] Morrow *v.* Inhabitants of Vernon, 35 N. J. L. 490 (1872); *cf.* Buller, J., in Master *v.* Miller, 4 Durnf. & E. 320, 340–41; also the recent Georgia case of Toole *v.* Cook, 82 S. E. 772 (1914), taking the same view.

[42] Bouvier *v.* Baltimore & New York Ry. Co., 67 N. J. L. 281, 293, 51 Atl. 781, 785 (1901).

[43] In the code states the situation is covered by the clause requiring all actions to be brought in the name of the "real party in interest." In other states there are usually express statutes. The statute in Illinois is in the Practice Act, 1913 REVISED STATUTES, Ch. 110, § 18.

lost his privileges as owner of the *chose*, and the assignee is as yet only partly owner because he lacks the immunities which are essential to complete ownership. The situation may be compared to that of a grantee of land under an unrecorded deed. In such a case we think of the grantee as owning the land, but his title is not complete: it is subject to a power on the part of the grantor to extinguish it by a conveyance to another purchaser who buys in good faith and complies with the recording act. Notice to the debtor plays the same part in the assignment of the *chose* in action that recording the deed does in the case of the grant of land.[44]

The device of suing in the name of the assignor has been of service in aiding our law to get rid of outworn rules in ways that are not always appreciated. At common law one disseised of land lacked the legal power to transfer title, apparently because his situation was assimilated to that of the owner of a *chose* in action.[45] It is not always noticed that here also in modern times a transferee of the disseisee could sue in the name of the disseisee and so recover possession of the land. The courts apparently applied all the rules as to control of the action, of execution, etc., to this case, the net practical result being that the transferee became owner actually though not nominally. When the New York Code of Civil Procedure was adopted, with its clause requiring all actions to be brought in the name of the real party in interest, doubt was expressed as to its effect on this situation; consequently an amendment was adopted expressly providing that in such cases the transferee should continue to sue in the name of the transferor.[46] In

[44] This comparison is made in Bishop *v.* Holcomb, 10 Conn. 444 (1835). Dean Ames put great emphasis upon this power of the assignor before notice as proof that the assignor still owned the *chose*, and he is right to the extent noted in the text. Before notice, there is complete ownership in neither assignor nor assignee.

[45] AMES, LECTURES ON LEGAL HISTORY, p. 174.

[46] See the whole subject discussed and cases cited in BLISS ON CODE PLEADINGS, 3 ed., § 23 *a*. So long as the common law action of ejectment prevailed, this application of the device of the "power of attorney" led to an action in which there were two "nominal plaintiffs" and one real "plaintiff." See Jackson *v.* Leggett, 7 Wend. (N. Y.) 377 (1831), in which in one count the tenant described the demise as made by the disseised grantor and in another as made by the grantee of the disseissee. Recovery was allowed on the first count. An interesting use of the "power of attorney" was made in the case of Kilgour *v.* Gockley, 83 Ill. 109 (1876). A note secured by a mortgage on real estate was transferred and the mortgage assigned without any conveyance of the property. Theoretically, therefore, the transferee had no title to the property. The court held, however, that the assignment carried a power of attorney

spite of this the New York Real Property Law of 1896 [47] reënacts the old rule that "a grant of land held adversely is void." In other words, the old label must be preserved, no matter what the contents of the bottle!

The device of the "power of attorney" could not be applied to partial assignments, with the result that nearly everywhere they are still enforceable only in equity.[48] This rule seems to be a sensible one, however, as it requires all three persons concerned to be made parties to the suit. The theory of equity apparently is that the debtor owes in equity part to the assignee and part to the assignor; the debtor is an equitable debtor of the assignee as well as of the assignor.

No attempt has been made in this paper to discuss anything but the question of alienability. Formal requisites for transfer; the necessity of consideration; the effects of transfer (1) on defenses of the debtor, (2) on rights of set-off, etc., (3) on equitable claims of other persons — the so-called latent equities — are left for discussion at a later time. In closing our discussion, however, a word must be said concerning the effects of transfer in its relation to our problem of alienability. If it be decided, as many courts hold, that the transferee of a common law *chose* in action takes subject to "latent equities" of third persons, even if he purchase in good faith and for value, this is not, as some have thought,[49] an argument that legal title does not pass to the assignee. It means simply that because of the historical origin of the doctrine, with its beginnings in equity, as well as because of certain notions of policy, the equitable doctrine which protects *bonâ fide* purchasers for value has not been extended to cover this form of property which became alienable only in modern times. If by statute the legislature should

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to bring actions at law in the name of the original mortgagee, and consequently that the transferee who had got into possession could not be disturbed. The practical result was that by gaining possession under the assignment the assignee became substantially the owner of the property.

[47] NEW YORK REAL PROPERTY LAW OF 1896, § 225.

[48] AMES'S CASES ON TRUSTS, 2 ed., pp. 63–64.

[49] George Luther Clarke, "The Real Party in Interest Statute in Missouri," 15 Univ. of Mo. Bulletin, No. 17, pp. 18–23. No one has ever doubted that title to overdue commercial paper may be transferred, though some courts hold that the transferee takes subject to equities of third persons. See the cases in 1 AMES, CASES ON BILLS AND NOTES, p. 191 and note 3, p. 892; also Justice *v.* Stonecipher, 267 Ill. 448, 108 N. E. 722 (1915).

repeal the doctrine of *bonâ fide* purchaser for value, it certainly would not follow that legal titles to land and chattels would cease to be transferable, but to such a conclusion we must come if we follow the logic of those who argue that even to-day the assignee of a *chose* in action does not acquire legal title.

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